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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-7871

TENNESSEE VALLEY AUTHORITY, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, ADMINISTRATOR, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Herbert S. Sanger, Jr.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

Lewis E. Wallace
Deputy General Counsel

Thomas A. Pedersen

Robert E. Washburn

Attorneys for Petitioner

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 4, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported in 523 F.2d 16 (C.A. 6, 1975), and a copy of the slip opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 4, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

At issue is the authority of the Environmental Protection Agency (hereinafter "EPA"), under section 110 of the Clean Air Act, to direct the method by which the states achieve ambient air quality standards in controlling air pollution from existing electric power generating plants. EPA has disapproved a Kentucky regulation which would permit the use of "intermittent emission limitation" systems to achieve national air quality standards. An "intermittent emission limitation" system achieves the air quality standards by varying the emission rate with changing meteorological conditions, thereby utilizing the assimilative capacity of the atmosphere as it fluctuates from time to time. In contrast, a "constant control system" sets a fixed emission rate without regard to changing atmospheric conditions. It is EPA's position that intermittent controls can be used only on an interim basis until constant controls are available or as a supplement to whatever constant controls are available. The question presented is:

> Did the Court of Appeals commit error in holding that EPA's Administrator acted within his statutory authority in disapproving a state regulation which would permit the use of intermittent emission limitation systems for the achievement and maintenance of applicable ambient air quality standards, where constant emission limitation systems are available?

STATUTE AND REGULATION INVOLVED

Section 110 of the Clean Air Act, 77 Stat. 392 (1963), *as amended*, 42 U.S.C. § 1857, 1857c-5 (1970; Supp. III, 1973), reads in pertinent part:

> (a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.
>
> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that--
>
> * * *

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> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls . . . .

Kentucky Air Pollution Control Regulation, AP-1 General Provisions § 1(1)(b) reads in pertinent part:

> Where it is demonstrated to the satisfaction of the Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing.

STATEMENT OF THE CASE

This is a proceeding to review and set aside the action of EPA's Administrator in disapproving a Kentucky air pollution regulation which was adopted as a part of Kentucky's implementation plan for the control of air pollution pursuant to section 110 of the Clean Air Act (42 U.S.C. § 1857c-5 (1970)).

This Kentucky regulation would permit electric generating plants and other air contaminant sources to control pollution through the use of any alternate control strategy where it could be demonstrated to the satisfaction of the Kentucky Air Pollution Control Commission (now the Department for Natural Resources and Environmental Protection) that the control strategy would "provide for achievement and maintenance of applicable ambient air

quality standards." Such alternate controls include "intermittent emission limitation" systems, which are "flexible" or "variable" emission limitations and which reduce pollution and achieve air quality standards by limiting the amounts of pollutants emitted as changing atmospheric conditions require.

EPA's Administrator disapproved the regulation on the ground that it "could be construed to permit intermittent control measures under circumstances where constant emission controls were available" (39 Fed. Reg. 29358 (1974)). Constant emission controls (such as scrubbers or the continuous use of low sulfur fuel) regulate emissions in accordance with "fixed" or "constant" emission limitations. Thereafter, TVA promptly filed its petition for review in the Court of Appeals on September 9, 1974.

Section 110 of the Clean Air Act requires that after EPA has promulgated ambient air quality standards, the states must submit implementation plans for the attainment, maintenance, and enforcement of such established standards. It further requires that the Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing, and that:

> (2)(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including but not limited to, land-use and transportation controls . . . . [42 U.S.C. § 1857c-5(a).]

The legal controversy herein centers on the meaning of this paragraph.[1] As stated by the Court of Appeals:

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[1] On June 6, 1975, during the pendency of this action, the Kentucky regulations were revised. The subject regulation was not included in

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> [T]he question in this case is whether the emission limitations requirement of Section 110(a)(2)(B) was satisfied by the Kentucky Plan in view of its provision permitting an air contaminant source to apply an alternate control strategy. If the requirement was satisfied, the Administrator was required to approve the plan as submitted. [App. 9-10.]

The court held that the regulation did not satisfy the "emission limitations" requirement. In reaching this conclusion the court relied upon the following passage from this Court's recent decision in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975):

> As we have already noted, primary ambient air standards deal with the quality of outdoor air, and are fixed on a nationwide basis at levels which the Agency determines will protect the public health. It is attainment and maintenance of these national standards which § 110(a)(2)(A) requires that state plans provide. In complying with this requirement a State's plan must include "emission limitations," which are regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards. [p. 78.]

In construing this passage, the court concentrated its attention on one word in the sentence describing "emission

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these new regulations. Respondents' motions to dismiss for mootness were denied on the grounds that there was a continuing controversy over the authority of the Administrator and that "The public interest in determination of the question in this case is obvious." (App. 6.)

limitations" as being "regulations of the *composition* of substances emitted into the ambient air,"[2] and from this it concluded that:

> The key word in this definition is "composition." The pertinent definition of "composition" in *Webster's Third New International Dictionary* appears to be "the nature of a chemical compound or mixture as regards the kind and amounts of its constituents . . . ." Under this definition a rule or regulation pertaining to sulfur dioxide or any other contaminant, would qualify as an emission limitation only if it regulates the *amount* of that kind of material which may be included in the emission from a given source. [App. 10; emphasis by the court.]

Based on this analysis, the court concluded that the Administrator had acted within his statutory authority in disapproving the regulation, and that there was nothing in the legislative history of the Act to suggest that the Administrator had misinterpreted the congressional will in his construction of section 110. For the reasons shown hereinafter, it is respectfully submitted that this is an improper interpretation of *Train* and that the court's interpretation is in direct conflict with the legislative intent and with the contemporaneous construction placed on the Act by EPA's first Administrator, William D. Ruckelshaus.

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[2] Emphasis added herein unless otherwise noted.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are threefold: (1) an existing controversy of national importance is presented, (2) the decision below is in conflict with this Court's opinion in *Train*, and (3) the decision below is contrary to the legislative intent and to EPA's contemporaneous construction.

I

An Existing Controversy of National Importance Is Presented.

The case presents an issue which has immediate importance far beyond the particular facts and parties involved. The court below recognized the national importance of this case when it found that:

> The public interest in determination of the question in this case is obvious. There is a subsisting controversy between the petitioners and EPA over the authority of the Administrator of that agency. [App. 6.]

At issue is the interpretation of a critical portion (§ 110) of the Clean Air Act. This Act is a major piece of complex legislation which has been the subject of nationwide controversy and litigation, due in part to the fact it created a dual (federal-state) approach to the control of air pollution. The proper interpretation of section 110 is vital to the Nation because it establishes the relationship between EPA's Administrator and the various states in the enforcement of the Act.

The fundamental question is whether the Clean Air Act gives EPA's Administrator authority to substitute his judgment for that of a state in determining the most desirable

method of controlling emissions to meet national ambient air quality standards. Initially, Congress struck a balance in the Clean Air Act between the roles of the states and EPA by requiring EPA to establish national ambient standards to protect the public and by leaving it up to each state, presumably more responsive than EPA to the needs of its citizens, to weigh the social and economic considerations of the various alternative methods of achieving those standards.

The present EPA Administrator has, however, upset that balance. The effect of his action, and of the Sixth Circuit's approval thereof, is to restrict the range of alternatives which can be used by a state to achieve the national standards—an action which has far-reaching ramifications of national significance. Several states in addition to Kentucky have already sanctioned the intermittent control approach. The elimination of the intermittent control alternative will result in the exploitation of greater amounts of low sulfur coal, mostly in the West. It could increase pressures to import larger quantities of foreign low sulfur oil; and it will inevitably divert enormous economic resources to installation and operation of expensive air pollution control equipment, even where such equipment is not needed to achieve ambient standards. For example, the cost of using constant controls on the TVA power system alone will be near $200 million each year, or 10 times more than intermittent controls would cost.

Furthermore, whatever the final outcome on the merits, it is to the Nation's interest to have this matter settled as quickly as possible. The electric power industry, the smelting industry, and others have for years been embroiled in a bitter nationwide controversy over the lawful methods for controlling air pollution. The design and

installation of air pollution control devices require long lead times and the investment of large sums of money. The conflicting interpretations by EPA administrators as to the legality of intermittent control systems has made it extremely difficult for many sources, especially utilities, to make the irrevocable commitment of hundreds of millions of dollars to install constant control measures when they may not ultimately be required. Thus, final clarification of the requirements of section 110 is crucial if we are to make timely progress in solving the Nation's air pollution problems.

Finally, the case is also of vital national importance because it involves the correct interpretation of this Court's recent opinion in *Train*, which is the only decision of this Court construing section 110. The live controversy surrounding the Sixth Circuit's interpretation of *Train* calls for prompt resolution to avoid needless and protracted litigation, and to afford the electric power industry adequate opportunity to comply with the law.

EPA's contention that the case was moot because the disputed regulation was not reinstated in Kentucky's new regulations was properly rejected by the court of appeals. This is a special statutory action to *challenge the authority* of the EPA Administrator under the Clean Air Act to strike down such an alternate control regulation. The record is clear, and it is not disputed, that the Administrator claims this statutory authority today and that the rejection of intermittent controls (except on an interim basis or to supplement constant controls) is a part of his present national policy. It is idle to suppose that Kentucky or any other state will now adopt such regulations in the face of EPA's declared policy against them and the court's sanction of that interpretation of the Administrator's authority.

The "controversy" is whether the Administrator has the statutory authority to disapprove this alternate control regulation and not whether Kentucky should or should not adopt such regulation. The statute defining the Administrator's authority has not been changed, nor has the Administrator's interpretation of the Act changed. The "controversy" still exists. It has not subsided but has actually intensified. Unless restrained, the Administrator will continue to enforce his interpretation of the Act by issuing compliance orders and striking down all such alternate control regulations.

The principles of law are clear. As said in *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115 (1974):

> The question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 US 270, 273 . . . (1941). And since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here "capable of repetition, yet evading review," so that petitioners are adversely affected by government "without a chance of redress." Southern Pac. Terminal Co. v. ICC, 219 US 498, 515 . . . (1911).
>
> . . . the challenged governmental activity in the present case is *not contingent*, has *not evaporated* or *disappeared*, and, by its *continuing and brooding presence*, casts what may well be a substantial adverse effect on the interests of the petitioning parties.

* * *

> . . . It is sufficient, therefore, that the litigant show the existence of an immediate and ***definite governmental action or policy*** that has adversely affected and continues to affect a present interest. [pp. 122, 125-26.]

This decision, and the authorities cited in the opinion below, demonstrate that the court of appeals was eminently correct in holding that there is a subsisting controversy between the parties, the determination of which is in the public interest.

II

The Decision Below Is in Conflict with This Court's Opinion in Train.

The goal of the Clean Air Act is to protect the quality of the air we breathe. That goal is achieved by assuring compliance with the national ambient ***air quality standards***. The basic structure of the law is that the federal government (EPA) has the responsibility for setting ambient air quality standards (§ 109), and the states have the responsibility for specifying the manner in which those standards will be achieved and maintained (§ 107). As stated in ***Train***:

> It is attainment and maintenance *of these standards* which § 110(a)(2)(A) requires that state plans provide. [421 U.S. at 78.]

Train makes it clear that section 110 requires the state implementation plans to contain "emission limitations," which are rules and regulations "which if enforced should result in ambient air which meets the national standards." (*Id.*) The Kentucky regulation in question does that in these precise terms:

> Where it is ***demonstrated*** to the satisfaction of the Commission that an air contaminant source can apply an alternate control strategy which ***will provide for achievement and maintenance of applicable ambient air quality standards***, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing. [Ky. Air Pollution Control Reg., AP-1 General Provisions § 1(1)(b).]

The Court of Appeals upheld the action of EPA's Administrator who disapproved this regulation on the ground that it

> . . . could be construed to permit intermittent control measures under circumstances where constant emission controls were available. [App. 3.]

There is nothing in *Train*, or the Clean Air Act, to suggest that ambient air quality standards must be attained through the use of constant controls, rather than through the use of intermittent controls, or any other type of controls. To the contrary, *Train* states very specifically that:

> Under § 110(a)(2), the Agency is ***required*** [emphasis by the Court] to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. ***The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a)(2)***, and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110 (c). Thus, so long as the ***ultimate effect*** of a State's choice of emission limitations is ***compliance with the national standards for ambient air***, the State is at liberty to ***adopt whatever mix of emission limitations it deems best suited*** to its particular situation. [421 U.S. at 79.]

The central theme throughout *Train* is that Congress has stated its goal to be the timely attainment and maintenance of specified air quality standards and that the states

have the primary responsibility for determining how that is done:

> We believe that the foregoing analysis of the structure and legislative history of the Clean Air Amendments shows that Congress intended to impose national ambient air standards to be attained within a specific period of time. . . . We also believe that Congress, consistent with its declaration that, "Each State shall have the primary responsibility for assuring air quality" within its boundaries, § 107(a), left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to revise choices about the mix of emission limitations. [*Id.* at 86-87.]

Train emphasizes that the goal is the attaining and maintaining of national ambient air quality standards, and that the states need not do more. In reversing the Fifth Circuit, this Court said:

> What the Fifth Circuit failed to consider, however, is that so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments. [*Id.* at 91.]

There is nowhere to be found in the Clean Air Act any requirement that constant controls be employed on existing plants to attain the national air quality standards. This is in sharp contrast to the Act's requirements for new plants. Section 111 of the Act, which governs new plants, specifically authorizes the Administrator to establish "standards of performance":

> (1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated. [42 U.S.C. § 1857c-6a.]

The basic error in the Court of Appeals' decision is its failure to recognize that a control strategy for *existing* plants is only required to restrict or limit emissions *to the extent necessary to meet ambient air quality standards*. This distinction between section 110 and section 111 is fundamental. The Sixth Circuit's decision destroys this basic distinction, and thereby thwarts the policy of the Act. Its interpretation of *Train* hinges on what it termed the "key" word "composition." By focusing on the dictionary definition of this word, the court reached a result which is contrary to the basic philosophy of section 110 as explained in *Train*, and as revealed in the legislative history of the Act. The result of this dictionary approach is to distort the meaning of the words "emission limitations" as used in section 110 by equating them with "emission reductions" or "emission standards," which are part of section 111 governing new plants, but not part of section 110.

It would appear to be inappropriate to interpret *Train* by isolating one word for dictionary analysis when such a method produces a result which is inconsistent with the main theme of the opinion. The weakness of such literal approach is aptly explained in *United States v. Witkovich*, 353 U.S. 194, 199 (1957); *United States v. Shirey*, 359 U.S. 255, 260-61 (1959); and *Natural Resources Defense Council v. Tennessee Valley Authority*, 459 F.2d 255, 257 (C.A.2, 1972).

III

The Decision Below Is Contrary to the Legislative Intent and to EPA's Contemporaneous Construction.

In upholding the Administrator's action the Court of Appeals stated that

> Nothing in the legislative history of the Act suggests that the Administrator has misinterpreted the congressional will in his construction of Section 110(a)(2)(B). As the Supreme Court noted in *Train v. NRDC*, interpretations of this complex statute by the agency charged with administering it are entitled to great deference. *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921). This court finds no reason to substitute its judgment for that of EPA in construing the Act. [App. 12.]

Yet, the court's opinion refers to none of the legislative history it relied upon. Neither does it advert to the fact that the interpretation placed upon section 110 by EPA's present Administrator is in conflict with the views of its original Administrator, William D. Ruckelshaus. With deference, we believe that the court's severely constricted interpretation of section 110 reflects a conception which ignores the basic scheme and objective of the Act and that the court should have accepted the contemporaneous construction of EPA's first Administrator (Ruckelshaus), rather than that of the present Administrator.

The law is clear that the contemporaneous interpretation of the original Administrator is accorded greater weight than the subsequent interpretation of his successor.

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Norwegian Nitrogen Co. v. United States, 288 U.S. 294 (1933); *Natural Resources Defense Council v. Environmental Protection Agency*, 507 F.2d 905, 916 (C.A. 9, 1974); *Chemical Bank New York Trust Co. v. Steamship Westhampton*, 231 F. Supp. 284 (D. Md. 1964), *aff'd*, 358 F.2d 574 (C.A. 4, 1965), *cert. denied*, 385 U.S. 921 (1966).

In his appearance before the Senate Subcommittee on Air and Water Pollution in February 1972, Mr. Ruckelshaus testified that if an emission control system[3] meets the air quality standards, there is no way that EPA can turn it down:

> *We have to accept a plan which meets an ambient air quality standard* in a particular region, and if they have no emission limitation as to sulfur oxide in that region, and no emissions of sulfur oxides or those being emitted don't violate the standards, *there is no way under the act that we can turn the plan down*.
>
> * * *
>
> *Our responsibility* is as spelled out in the bill which went through this committee and passed the Senate,

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[3] Emission control strategies take a variety of forms and are discussed under various terminologies such as "Intermittent Control Systems," "Variable Control Systems," "Supplemental Control Systems," etc. Whatever form or name is used, EPA acknowledges that they are "emission limitations" designed to "ensure that emissions are curtailed at the times and to the extent necessary to assure that the National Ambient Air Quality Standards are maintained regardless of adverse meteorogical conditions."

EPA also acknowledges that such systems "can incorporate design and enforcement features that will provide a reliable means to attain and maintain NAAQS [National Ambient Air Quality Standards] for sulfur oxides." (40 Fed. Reg. 19212 (1975).)

> and that is that *we are to set national ambient air quality standards. The states supply us implementation plans as to how they meet those standards.*
>
> * * *
>
> Now in section 110(a)(2) of the act which I have to administer says: "The Administrator *shall* approve such plan, *if it meets the ambient air quality standards* both primary and secondary." It doesn't say, I *may*. [*Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong.. 2d Sess. 238, 245, 273 (1972).]

He also emphasized that EPA's role was not to dictate to the states the types of systems the states must require to attain and maintain the air quality standards, but that EPA should encourage a variety of approaches to the problem:

> The purpose of appendix B [to the Guidelines] was *not to tell the States what they had to do* but to *give them suggestions* and provide them with the kind of *flexibility* and ability with which to *innovate* in order *to meet the standards themselves*, and which we felt were necessary in order to receive acceptable plans. [*Id.* at 231.]
>
> These regulations make it clear that a State plan does not meet the requirements of the Clean Air Act unless it contains a control strategy to *attain* and *maintain* the *national standards*. *The regulations encourage the States to consider a variety of approaches* to control emissions, including the application of economic incentives or disincentives, the relocation of sources, and changes in methods of operation of sources. [*Id.* at 226.]

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Throughout his testimony Mr. Ruckelshaus stressed the fact that under the law, and under EPA's guidelines, the control strategies available to the states in meeting the air quality standards were many and varied, and all that is required is that the standards be met. As to such control strategies he said:

> Control strategy, as defined in the guidelines is a combination of measures designated to achieve an aggregate reduction of emissions necessary for attainment of the national standard including, but not limited to, measures such as an emission limitation. [*Id.* at 238.]

That is precisely the view expressed in *Train*.

By letter dated March 15, 1972, Mr. Ruckelshaus submitted to Senator Eagleton and the subcommittee a memorandum of law which discussed the concept of "emission limitations" in more detail, and which stated in part:

> The term "emission limitations" should not and cannot be so narrowly defined as to exclude monitorable and enforceable measures which control emissions in other ways than by limiting the amount of pollutants emitted from stacks.
>
> . . . There can be no argument that the term "emission limitation" encompasses, in addition to specific numerical limits on discharges from stacks, such measures as restrictions on the use of certain fuels, restrictions certain activities, regulations controlling hours and manner of operations and other similar measures.
>
> It is necessary to emphasize this point because it is important that the meaning of an "emission limitation"

be understood. The term cannot and should not be so limited that it prevent the use of innovative requirements of different control requirements than have been used in the past. [*Id.* at 314-15.]

The effect of the court's opinion in upholding the Administrator's action is to allow EPA to usurp the power of the states and to regulate and establish emission standards for existing plants under section 110 in the same manner as it establishes emission standards and performance standards for new plants under section 111. This is clearly contrary to the congressional intent.

The question of whether Congress should control air pollution by setting standards for the degree of concentration of pollutants in the ambient air (air quality standards), or by setting standards for the quantity or rate of stack emissions (emission standards), involved a choice between two basically different concepts. It is a problem which has given Congress much concern. The legislative history of the Act shows that Congress not only considered the question of using emission standards for existing plants, as well as new plants, but it expressly rejected that approach.

The consistent congressional policy with respect to *existing* plants (except plants converting from oil to coal) has been to control pollution through the use of ***ambient air quality standards***, not through stack emission standards. The reasons that new plants (§ 111) are treated differently are obvious. Perhaps it was best capsuled by Senator Cooper:

The concept is that wherever we can affort or require new construction, we should expect to pay the cost of

using the best available technology to prevent pollution. [116 Cong. Rec. 32918 (1970).]

This basic question arose at a hearing in 1972 before the Senate Subcommittee on Air and Water Pollution at which Mr. Ruckelshaus testified:

> There was a debate in Congress as to whether we had the power to establish national emission controls and that was specifically excluded and instead there was an air quality standard adopted as opposed to an emission standard.
>
> * * *
>
> . . . The Congress could have done two things. They could have set, as they did, the responsibility of the Environmental Protection Agency to set national ambient air quality standards to protect public health and all known anticipated effects of certain air pollutants. That is what we have done.
>
> Senator Baker. What I am saying is, to refine it a little further, that Clean Air Act and clean air amendments in effect are a criteria system with certain Federal standards in the case of hazardous and toxic substances, but it is still essentially a criteria system, leaving it up to the States with flexibility to decide what control techniques or what emission standards they will impose, not we. [*Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess. 266-67 (1972).]

Later in the discussion Senator Baker made it clear that if *emission* standards are desired, instead of *air quality* standards, the Act should be amended·

> Senator Baker. No, the way to say that, instead of emission limitation, is to say emission standards as with automobiles and parts per million.
>
> * * *
>
> . . . If you want to do it as emission standard system, change the act, don't fuss at him, fuss at the committee. [*Id.* at 270.]

It is clear from this cursory reference to the legislative history that the decision of the Court of Appeals is inconsistent not only with the congressional intent, but also with the contemporaneous construction of the statute by EPA's first Administrator.

CONCLUSION

It is respectfully submitted that the issues presented herein are of such magnitude and national importance, and the decision of the court below is of such doubtful validity, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Herbert S. Sanger, Jr.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

Lewis E. Wallace
Deputy General Counsel

Thomas A. Pedersen

Robert E. Washburn

Attorneys for Petitioner

I authorize the filing of this petition for a writ of certiorari.

Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I certify that the foregoing petition for writ of certiorari was served on all parties required to be served by mailing three copies thereof airmail, postage prepaid, to counsel of record as follows: Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530; Charles W. Shipley, Esq., Pollution Control Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C. 20530, and Richard J. Denny, Jr., Esq., Office of General Counsel, Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20024; on the intervenor Commonwealth of Kentucky by mailing copies to Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; and on the intervenor Natural Resources Defense Council, Inc., by mailing copies to Richard E. Ayers, Esq., 1710 N Street, NW, Washington, D.C. 20036.

This 1st day of December, 1975.

Thomas A. Pedersen
Division of Law
Tennessee Valley Authority
Knoxville, Tennessee 37902

Attorney for Petitioner
Tennessee Valley Authority

Appendix

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No. 74-2015
No. 74-2020

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BIG RIVERS ELECTRIC CORPORATION, CITY UTILITY COMMISSION OF THE CITY OF OWENSBORO, KENTUCKY, EAST KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, KENTUCKY POWER COMPANY, KENTUCKY UTILITIES COMPANY, THE UTILITY COMMISSION FOR THE CITY OF HENDERSON, KENTUCKY MUNICIPAL POWER AND LIGHT SYSTEM,

Petitioners,

COMMONWEALTH OF KENTUCKY, PEABODY COAL COMPANY,

Intervenors,

v.

ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E TRAIN, Administrator,

Respondent.

TENNESSEE VALLEY AUTHORITY,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, Administrator,

Respondents.

PETITIONS for Review of Action of the Administrator of the Environmental Protection Agency

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NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Intervenor,

ED W. HANCOCK, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY,

Intervenor.

Decided and Filed September 4, 1975.

Before: CELEBREZZE, MILLER and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. The underlying question in this case is whether the Administrator of the Environmental Protection Agency (EPA) properly disapproved a state regulation promulgated under the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857a-j (Supp. 1975), which would have authorized coal-burning plants ("sources" in the Act) to employ 'alternate control strategies' for the control of air pollution by sulfur oxide gases without showing that constant emission controls of such pollutants are unavailable. Constant emission controls are achieved primarily by the installation of "scrubbers." The alternate control method employed by the petitioners consists principally of the use of intermittent emission limitations systems. The separate petitions for review filed by the Tennessee Valley Authority (TVA) and several electrical utilities companies operating in Kentucky (the Utilities) were consolidated for hearing. At issue is the action of the Administrator in disapproving a portion of the Kentucky "Implementation Plan for the Attainment and Maintenance of the National and State Ambient Air Quality Standards" (Kentucky Plan). The portion which was disapproved provided as follows:

> Where it is demonstrated to the satisfaction of the [Kentucky Air Pollution Control] Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing. Ky. Air Pollution Control Reg. No. AP-1, § 1 (1)(b).

Original EPA approval of the entire Kentucky Plan was vacated by this court for failure to adhere to the requirements of the Administrative Procedure Act. *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162 (6th Cir. 1973). Subsequently the Kentucky Plan, with the exception of Section 1(1)(b), *supra*, was approved on August 9, 1974. The Acting Administrator of EPA stated with reference to Section 1(1)(b), his opinion "that this provision of the Kentucky plan – if not specifically disapproved – could be construed to permit intermittent control measures under circumstances where constant emission controls were available." To eliminate the possibility of such an interpretation the section was specifically disapproved for failure to meet the requirements of controlling federal regulations.

The Utilities and TVA maintain that EPA's disapproval of the quoted provision of the Kentucky Plan will prevent them from meeting the established air quality standards by use of "intermittent emission limitation" systems which are much less costly than scrubbers. The petitioners argue that the purpose of the Clean Air Act is to establish national standards of air quality within a scheme of dual responsibility which leaves to the States the task of formulating actual emission standards. They maintain that Congress has made air pollution control a partnership venture in which EPA sets standards and each State determines the methods best suited for reaching those standards within its geographical boundaries. Thus they argue that the Administrator has exceeded his statutory

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authority in disapproving a portion of the Kentucky Plan dealing only with a permissible method of controlling air quality while finding that the Plan otherwise met the national standards. In the alternative they contend that even if the Administrator possessed such power, his action in disapproving the Kentucky provision for an alternate strategy was arbitrary and constituted an abuse of discretion.

Jurisdiction

Though the question has not been raised by any of the parties there is an issue with respect to the court's jurisdiction to consider these petitions. Judicial review of actions of the Administrator is provided for in Section 307 of the Act, 42 U.S.C. § 1857h-5(b)(1) as follows:

> . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. . . .

There is no statutory provision for review of an action *disapproving* a plan or a portion thereof because disapproval is not a final administrative action. *Utah International, Inc.* v. *EPA*, 478 F.2d 126 (10th Cir. 1973). However all parties including the Administrator have treated his action as a final approval of the Kentucky Plan with the disapproved portion eliminated, and we treat the proceedings as a petition for review of the approval of the Plan.

The Mootness Issue

The Commonwealth of Kentucky, by its Attorney General, has been permitted to intervene in these proceedings, and has made a motion to dismiss them as moot. EPA has also filed a motion to dismiss on the same ground. The Kentucky General Assembly in 1974 required administrative agencies of

the Commonwealth, including the Department for Natural Resources and Environmental Protection (the Department), to file all their regulations by July 1, 1975. On March 1, 1975, the Department caused its proposed regulations to be printed in the *Administrative Register*, the official compilation of such regulations. On July 2, 1975, final review of the regulations took place and the new regulations became effective as of June 6, 1975. The current air pollution control regulations do not contain the language of Section 1(1)(b) of the former regulation or any equivalent provision which would permit approval by the Department of alternate control strategies. Thus it is argued that there is no case or controversy to be decided since the questioned regulation is no longer in force.

The jurisdiction of federal courts is limited by Article III of the Constitution to consideration of actual cases and controversies. Thus federal courts do not render advisory opinions or continue to consider an action if the controversy which underlies the action ceases to exist prior to its termination. *See United States* v. *Hamburg-American Co.*, 239 U.S. 466, 475-76 (1916); *California* v. *San Pablo & Tulare R.R.*, 149 U.S. 308, 314 (1893). For more recent Supreme Court pronouncements on the general doctrine of mootness, see *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

The mootness doctrine has limited application in at least two related types of cases. One type is specifically concerned with administrative orders. This limitation was first enunciated in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911), which involved preferential freight rates. The terminal company instituted an action to challenge an order of the ICC which prohibited the granting of such preferences. The order expired before the case reached the Supreme Court, and the ICC argued that the case had become moot. The Court held otherwise, stating – "The questions involved in the orders of the Interstate Commerce Commission are usually

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continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review . . . ." *Id.* at 515. This is a proper case for application of the *Southern Pacific Terminal* doctrine since it concerns an order which is clearly capable of repetition, but which would evade review if the principle of mootness were strictly applied.

The other class of cases which requires relaxation of the mootness principle consists of those in which persons other than the parties to the action have a tangible interest or are likely to be directly affected by the outcome of the litigation. Cases which involve public interest, or rights of the public generally, are not necessarily rendered moot by an act which puts an end to the particular controversies which precipitated them. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). The fact that one party to whom an administrative order is directed elects to comply with it should not deprive others who claim to be adversely affected by the order from contesting it. *Cf. Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974). The public interest in determination of the question in this case is obvious. There is a subsisting controversy between the petitioners and EPA over the authority of the Administrator of that agency. The action of the Kentucky Department in no way answered the questions which this case raises concerning the Administrator's authority.

The motions to dismiss for mootness are denied.

The Merits

The history of the Clean Air Act Amendments of 1970 (the Act) and its scheme for achieving and maintaining air quality through joint state-federal action are clearly described in *Buckeye Power, Inc.* v. *EPA, supra*, 481 F.2d at 165-66, and *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F.2d 390, 394-96 (5th Cir. 1974), *rev'd on other issues sub nom.*

Train v. *Natural Resources Defense Council, Inc.*, — U.S. —, 43 U.S.L.W. 4467 (April 16, 1975). The dual (state-federal) approach of the Act is basic to its structure, and this case requires a delineation of certain areas of authority reserved to each governmental partner. The contention of petitioners that the scheme of the Act limits the role of EPA to that of setting primary and secondary ambient air quality standards and leaves to the States the selection of the means of attaining and maintaining these standards is an oversimplification.

Involved in this case is Section 110(a)(2) of the Act, 42 U.S.C. § 1857c-5(a)(2), by which the Administrator is required to approve or disapprove each plan or portion thereof within four months after the date required for submission by the States, approving the plan "if he determines that it was adopted after reasonable notice and hearing" and that

> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls; . . . .

The respondents and the intervenor, Natural Resources Defense Council, Inc. (NRDC), argue that the Administrator is not required to approve a plan which does not include emission limitations, and that an alternate control strategy which is based upon intermittent emission control measures does not meet this requirement. Such practices are said to merely disperse the pollutants emitted from sources without reducing the amounts. Thus, these parties construe the language of Section 110(a)(2)(B) to mean that a plan must require each source of pollution to apply continuous limitations to the amount of sulfur dioxide which it emits. (Though the limitations requirement applies to several contaminants, the present case is concerned with sulfur dioxide.) The alternate control strategy advocated by petitioners would permit a

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source to restrict its emissions by switching to low sulfur fuel or reducing operations at the source only during those periods when atmospheric conditions and existing pollution levels dictate a need for a specific source emission reduction. Implementation of the alternative strategy would depend on the aggregate of pollution in a given area rather than the emission from any particular source.

The Fifth Circuit dealt with the same basic issue in *NRDC* v. *EPA, supra,* which involved a provision of the Georgia Plan that permitted amounts of particulates and sulfur dioxide emissions to depend on the heights of smokestacks at the sources. The court held that this "tall stack" approach was in conflict with Section 110(a)(2)(B) of the Act since it resulted in the enhancement of dispersion of pollutants rather than limitation of their emission. Adopting the "broad approach" interpretation of Section 110(a)(2)(B), the court concluded that the Act established a policy of "nondegredation" of the atmosphere and that "[t]he only techniques fully capable of guaranteeing nondegredation are emission limitation techniques." 489 F.2d at 409.

The petitioners argue that the alternate control strategy which they would employ if the disapproved portion of the Kentucky Plan were reinstated would in fact be "emission limitations." It is their position that the intermittent control system provides a "flexible" emission limitation which restricts the amounts of pollutants emitted when atmospheric conditions require it. Thus, they contend that a system which *restricts* emissions of pollutants in any degree, if included in a plan, would qualify that plan for approval if the other conditions of Section 110 were met. Furthermore, the petitioners point out that Section 110(a)(2)(B), in addition to requiring that a plan include emission limitations, also requires the inclusion of "such other measures as may be necessary to insure attainment and maintenance" of air quality standards. It is contended that "such other measures" refers to alternate control strategies.

The respondent and intervenor NRDC rely on the Fifth Circuit's answer to these arguments. That court held that the Act mandates the use of techniques for emission *reduction*, and that the use of other measures is permitted only when "necessary" in the sense that it is shown that emission reduction techniques are "unavailable or infeasible." 489 F.2d at 410. A plan which would permit unlimited emission of pollutants into existing clean air and require limitation only when emissions would cause air quality at the location of the particular polluting source to fall below prescribed standards would conflict with the congressional policy of nondegredation under the Fifth Circuit's interpretation of the Act.

On appeal to the Supreme Court, consideration of the Georgia Plan was limited to the question of whether variances were to be treated as "revisions" of the plan under Section 110(a)(3) or "postponements" under Section 110(f). *Train* v. *NRDC*, *supra*, — U.S. at — (slip opinion at 7-8). The "tall stack" ruling was not appealed. Nevertheless, the Court traced the history of national clean air legislation and concluded that "the heart of the 1970 Amendments" is the requirement of Section 110(a)(2)(A) that each state plan provide for attainment, within three years of its approval, "of the national primary ambient air quality standards in the particular State." *Id.* at — (slip opinion at 5). After noting the requirement of Section 110(a)(2)(B) that a plan include "emission limitations, schedules, and timetables for compliance with such limitations," the opinion further noted that under the statute "it [a State plan] must *also* contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards." *Id.* at — (slip opinion at 5) (emphasis added). It is clear from this language that other measures may not be substituted for emission limitations, but may only be provided in addition thereto.

Thus the question in this case is whether the emission limitations requirement of Section 110(a)(2)(B) was satisfied

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by the Kentucky Plan in view of its provision permitting an air contaminant source to apply an alternate control strategy. If the requirement was satisfied, the Administrator was required to approve the Plan as submitted. In *Train* v. *NRDC* the Supreme Court provided a definition of "emission limitations" as follows:

> As we have already noted, primary ambient air standards deal with the quality of outdoor air, and are fixed on a nationwide basis at levels which the Agency determines will protect the public health. It is attainment and maintenance of these national standards which § 110(a)(2)(A) requires that state plans provide. In complying with this requirement a State's plan must include "emission limitations," which are regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject and which if enforced should result in ambient air which meets the national standards. *Id* at — (slip opinion at 16-17).

The key word in this definition is "composition." The pertinent definition of "composition" in *Webster's Third New International Dictionary* appears to be "the nature of a chemical compound or mixture as regards the kind and amounts of its constituents . . . ." Under this definition a rule or regulation pertaining to sulfur dioxide or any other contaminant, would qualify as an emission limitation only if it regulates the *amount* of that kind of material which may be included in the emission from a given source.

The petitioners contend that the use of the word "composition" by the Supreme Court was unfortunate, but that the opinion in *Train* v. *NRDC* otherwise fully supports their position. They rely particularly on the following language:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards.

> Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.
>
> -- U.S. at -- (slip opinion at 17).

We cannot assume that the word "composition" was imprecisely used. The language quoted above follows the Court's definition of emission limitations and must be read in the light of it.

No plan satisfies the requirement of Section 110(a)(2)(B) which might be construed to permit a source of pollutant emissions to continue operating beyond the time limit established in Section 110(a)(2)(A) without the application of one or more systems which control the "kind and amounts" of air contaminant emissions. The Administrator determined that the provision of the Kentucky Plan which he disapproved was susceptible of a construction which would permit state adoption of measures not within the definition of "emission limitations" without a showing that measures which satisfy that definition were unavailable. We find that the Administra-

tor acted within the scope of his authority, that his decision was not arbitrary and did not constitute an abuse of discretion.

The first purpose of the 1955 Clean Air Act was stated to be "to protect and enhance the quality of the Nation's air resources . . . " 42 U.S.C. § 1857(b)(1). As the Supreme Court pointed out in *Train* v. *NRDC* the states responded slowly to expressions of congressional concern about air pollution between 1955 and 1970, and "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 . . ." -- U.S. at -- (slip opinion at 2). The national policy is to reduce air pollution. Under the dual scheme, the freedom of the States to choose the manner of achieving this goal was made subject to the absolute requirement that every state plan include emission limitations as an ingredient. Nothing in the legislative history of the Act suggests that the Administrator has misinterpreted the congressional will in his construction of Section 110(a)(2)(B). As the Supreme Court noted in *Train* v *NRDC*, interpretations of this complex statute by the agency charged with administering it are entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), *McLaren* v *Fleischer*, 256 U.S. 477, 480-81 (1921). This court finds no reason to substitute its judgment for that of EPA in construing the Act.

The petitions for review are denied.